PUBLIC PROSECUTOR

v.

MUHAMAD NASIR SHAHARUDDIN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VISU SINNADURAI J
[CRIMINAL TRIAL NO. 47-23-91]
15 SEPTEMBER 1992

CRIMINAL PROCEDURE: *Dangerous Drugs - Raid on house - Husband and wife (the accused) and a 3rd person arrested - Both accused charged jointly for trafficking - Section 170 of Criminal Procedure Code - 3rd person released on bail and turned prosecution witness - Cautioned statements made by 1st accused challenged - Trial-within-a trial - Held inadmissible - Recording of statement haphazard and confused - Prosecution sought to adduce other statements made by 1st accused under s. 27 of the Evidence Act 1956 - Prima facie case against 1st accused but 2nd accused acquitted and discharged - 1st accused alleged drugs belonged to the 3rd person - Whether 1st accused had control of all the drugs in the house - Whether the fact 2nd accused lived in the house with the 1st accused as husband and wife meant she was in joint occupation of premises and therefore she was in joint possession of the drugs - Reliance on presumption under s. 37(g) read together with s. 37(b) to establish joint occupancy - Whether 2nd accused had care and management of premises - Dangerous Drugs Act ss. 39B(1), 37A, 37(b), (g), (da) and Evidence Act 1950 s. 27.*

Both the accused (husband and wife), and a 3rd person were arrested from a house where 3,455.51 grammes of cannabis were seized. Both were jointly charged under s. 39B(1)(a) of Dangerous Drugs Act 1952 (DDA 1952) punishable under 39B of DDA 1952. The 3rd person, a relative, was released on bail and subsequently turned prosecution witness.

The drugs were found in the kitchen/dining area, the second room of the house where the 3rd person was found sleeping, the toilet and the living room. A large amount of drugs had been found in the room occupied by the 3rd person but none in the room occupied by both the accused. The prosecution's case was that as both accused had possession of the drugs in the said premises, they were deemed to be trafficking in the said drugs. It also relied on the alleged statements made by 1st accused to the police officer on being questioned which it said purportedly led to the discovery of the drugs and other related paraphernalia in the second room and other places claiming these were admissible under s. 27 of Evidence Act 1950.

At the trial, defence challenged the admissibility of 1st accused's statements as being non-compliant with the requirements of s. 37A of DDA 1952. A trial-within-a-trial was ordered to determine its admissibility. It also challenged the admissibility of other statements that were sought to be admitted under s. 27 of the Evidence Act 1950. The 1st accused alleged that the drugs belonged to the 3rd person who was a frequent visitor to the house. The question arose whether the 1st accused had possession of **all** the drugs discovered for purposes of s. 39B, read together with s. 37(da) of the DDA 1952.

The case against the second accused was that as she had lived with the first accused in the house as husband and wife, she was in joint occupation of the premises and therefore in joint possession with the 1st accused of the drugs found in the house. To establish joint occupancy the prosecution relied on presumption under s. 37(g) read together with s. 37(b) of the Dangerous Drugs Act 1952.

At the close of prosecution case, the Court found a *prima facie* case against the 1st accused and none against the 2nd accused. Therefore the 2nd accused was acquitted and discharged and the 1st accused was called to enter his defence.

Held:

[1] At the trial-within-a-trial, the cautioned statement made by the 1st accused was held inadmissible for being non-compliant with the requirements of s. 37A DDA of 1952 as the process of recording was procedurally defective as well as confused and haphazard.

[2] The presumption under s. 37(g) read together with s. 37(b) may only be invoked to establish knowledge of concealed drugs if it can be proved the 2nd accused had care and management of the premises. As no evidence had been proffered to establish care and management of the premises, and the mere fact of living together as husband and wife was insufficient to establish such control, the prosecution had failed to prove the case against the 2nd accused. Also as the prosecution had failed to establish joint possession, she was deemed not to have committed the offence of trafficking. Therefore the 2nd accused was acquitted and discharged.

[3] Statements made by the 1st accused which purportedly led to the discovery of the drugs were inadmissible under s. 27 of the Evidence Act 1950 as they do not fall under its ambit. That section was not applicable in cases of a mere discovery of a fact or of a reconfirmation of an already known fact or where the police already had the means of obtaining the fact. As the police had prior knowledge of the existence of the drugs, the drugs therefore was not discovered by the police solely as a consequence of the statements made by him.

[4] Though by virtue of s. 37(b) the 1st accused was an occupier as he had care and management of the premises, the prosecution failed to establish that he had knowledge of **all** the drugs found in the house. Also it cannot rely on the presumption under s. 37(g) as not **all** the drugs were found contained in something. The presence of a 3rd person in the house meant that it could not be proved that **all** the drugs in the house were in the exclusive possession of the 1st accused.

[5] As the prosecution had failed to prove beyond reasonable doubt that the 1st accused had exclusive custody and control of **all** the drugs, which is an essential ingredient of the offence of possession of drugs, the charge of trafficking was not made out.

[Both accused were acquitted and discharged.]

Cases referred to:

Mohamed Yusof v. PP [1983] 2 MLJ 167 ***(foll)***
Cheong See Leong v. PP [1948-49] MLJ Supp 56 ***(refd)***
PP v. Yong Kong Hin [1981] CLJ (Rep) 259 ***(refd)***
Lee Look v. PP [1985] 1 MLJ 240 ***(refd)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(foll)***
PP v. Munusamy [1987] 1 MLJ 492 ***(foll)***
Director of Public Prosecution v. Merriman [1973] AC 584; [1972] 3 All ER 42 ***(refd)***
Jayaraman & Ors. v. PP [1979] 1 MLJ 88 ***(refd)***
Loh Shok Mow v. PP [1987] 1 MLJ 362 ***(refd)***
R v. Searle [1971] Cr LR 592 ***(refd)***
Tansley v. Painter [1969] Cr LR 193 ***(refd)***
R v. Bland [1988] Cr LR 41 ***(refd)***
Choo Chang Teik & Anor. v. PP [1991] 1 CLJ (Rep) 54 ***(refd)***
Mohamad Radhi v. PP [1991] 1 CLJ (rep) 311 ***(foll)***
R v. Ramasamy [1965] AC 1 ***(refd)***
Wai Chan Leong v. PP [1989] 1 SCR 715 ***(refd)***

Pang Chee Meng v. PP [1992] 1 CLJ (Rep) 265 ***(refd)***
R v. Abbot [1955] 2 All ER 899 ***(foll)***
Shamsuddin bin Hassan v. PP [1992] 1 SCR 494 ***(foll)***
PP v. Aris [1989] 2 CLJ (Rep) 289 ***(refd)***
Lee Chee Meng v. PP [1992] 1 SCR 483 ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(foll)***
R v. Courtie [1984] 1 All ER 740 ***(refd)***
Krishnan v. PP [1987] CLJ (Rep) 145 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 170, 180
Dangerous Drugs Act 1952, ss. 37A, 37(b), (d), (da), (g), 39B, (1)(a)
Evidence Act 1950, s. 27
Penal Code, s. 34

Other sources referred to:
11 Halsbury Laws of England 4th Edn., [now Vol. 11(1) of the reissue], para. 215
Misuse of Drugs, Bucknell & Ghodse, (Criminal Law Library No. 2), 2nd Edn., 1991, Waterlow Publishers, Para. 11.08
The Law of Evidence, Ratanlal & Dhirajlal, 17th Edn., p. 82

For the first accused - Bhagwan Singh; M/s. Bhagwan Singh
For the second accused - Gulam Mustaffa Nadar Ali Khan; M/s. Gulam Mustaffa & Co.
For the prosecution - Farah Suhana; AG's Chambers

JUDGMENT

Visu Sinnadurai J:

Large quantities of ganja were found in a house raided by the police. The police arrested the husband, the wife and a third person who were all in the house at the time of the raid. The third person, the relative was subsequently released on bail, and only the husband and wife were charged for trafficking in dangerous drugs. The third person, became a prosecution witness and gave evidence in Court.

Both the accused, husband and wife were charged as follows:

> Bahawa kamu bersama-sama pada 6 Januari 1991 jam lebih kurang 6.30 pagi di rumah Nombor 612, Batu 5, Jalan Gombak dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan telah mengedar dadah berbahaya iaitu ganja yang beratnya berjumlah 3,455.51 gram, oleh itu kamu telah melakukan kesalahan di bawah s. 39B(l)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B Akta yang sama.

The facts of the case as adduced by the prosecution are as follows: Inspector Zulkifli Hassan, Inspector Giam Kar Hoon and Inspector Mohd. Tahir together with about 10 other police personnel were involved in a police operation at 6.30a.m in the morning of 6 January 1991. They raided a house, Lot 612, Batu 5, Jalan Gombak, Kuala Lumpur. The police were stationed all around the house. Inspector Giam was on the roof, whilst Inspector Zulkifli was at the front of the house.

Inspector Zulkifli knocked the front door of the house and having identified himself as a police officer, asked that the door be opened. The first accused opened the door and the rest of the police party entered the house.

In the kitchen/dining area of the house, the police found several brown paper rolls suspected to contain ganja (cannabis). The first accused was then handcuffed. Inspector Giam then cautioned the first accused and he then questioned the first accused. The first accused,

according to Inspector Giam, made certain statements to him in response to his questions. When the police went to the second room of the house, another person, Ismail bin Katan was found sleeping. He too was arrested and questioned. The wife of the first accused, the second accused who was found sleeping in the first room was also arrested.

The statements made by the first accused was challenged in Court by the defence on the ground that there was no due compliance of s. 37A of the Dangerous Drugs Act. A trial-within-a-trial was conducted and this Court then held the caution statement to be inadmissible (see below).

A. ***Trial-Within-A-Trial***

Whether the safegurards embodied in s. 37A of the Dangerous Drugs Act had been complied with cannot be determined by a mere analysis of each facet of the process of recording the statement. Section 37A, like s. 113 of the CPC serves two purposes (i) to assist the prosecution in establishing its case against the accused; and (ii) to protect the accused against the admission of incriminating statements made by him falsely induced by hope or fear. The whole process has to be considered by the Court in its totality, bearing in mind that so long as the arrested person was aware and fully understood the implications and the consequences of making the statement, it should be admissible.

Whether the arrested person did or did not understand the implications and consequences of making the statements, depends on the facts of each case. It is therefore a question of fact which each Court has to decide. In this regard, precedents whilst being useful in providing guidance, cannot be strictly adhered to. The ultimate test is whether the statements sought to be admitted 'appears to the Court' to be voluntarily made. Generally, **voluntariness** is an accepted term used to indicate that the statement made by the accused was at the free will of the arrested person.

Let us consider the facts of the present case: The police conducted an early morning raid. The first accused was handcuffed almost immediately and he was questioned soon after that. At this time, the accused person was confronted by several police personnel all over the house. The statement, therefore does not appear to have been recorded in a calm environment. The accused person was questioned throughout the house whilst search appears to have been conducted simultaneously. The accused was asked to open certain exhibits whilst statements were being recorded by the raiding officer. At times, another person (Ismail Kantan) was also being questioned simultaneously. At other times, the recording of the statement was taken over by another police personnel. Simultaneously, photographs were taken of the accused person. It would therefore appear that it would have been more appropriate for the police to have asked the accused to show the various exhibits, photographed the sequence of events and then asked the accused to make the statement after administering the necessary caution. It must be pointed out, that the mere mechanical administration of a caution by itself is, in most cases, insufficient to show that there has been due compliance of the law.

There were some suggestions of a promise being made to the accused person - the accused person alleging that the police personnel had promised not to harm his wife, children and a relative who were all in the house. By itself, the defence was unable to convince the Court that the statement made by the accused was in furtherance of this promise. In any case, if there was such a promise, it would be a further factor to indicate the involuntariness of the statement made by the accused.

The learned Deputy Public Prosecutor has diligently provided the Court with much assistance by furnishing relevant authorities to support her contention that the statement made by the accused was voluntary. Whilst the authorities proved helpful to the Court, the learned Deputy

Public Prosecutor had a difficult task in persuading the Court that the hurried and chaotic manner in which the statement was recorded by the police was the most desirable manner of recording the statement in the circumstances of the case. No reasonable explanation was given as to the haphazard manner in which the statements were recorded by the police.

There are also certain procedural aspects of the recording of the statement which has caused some concern to the Court. Inspector Giam who recorded much of the statement was also an officer who took an active part in the raid. Furthermore, whilst taking the statement from the accused person, Inspector Giam also actively participated in photographing the various exhibits which were found in the house. Whilst it may be true that the mere fact that the recording officer was also an officer taking an active role in the raid does not by itself vitiate the caution statement (see *Mohamed Yusof v. PP* [1983] 2 MLJ 167), considering the several roles played by Inspector Giam, it would appear that there was a possibility of some 'likelihood of bias' on his part: see *Cheong See Leong v. PP* [1948-49] MLJ Supp 56; *PP v. Yong Kong Hin* [1981] CLJ (Rep) 259 and *Lee Look v. PP* [1985] 1 MLJ 240.

One other disturbing feature of the procedural aspect of the recording of the statement was that, the statements of not only the first accused, but also another, Ismail Katan were also recorded in the same statement. As a consequence, there was at times some confusion as to which of the statements were that of the first accused and which were of Ismail Katan.

To further add to this confusion, Inspector Giam also said in evidence that whilst he was photographing the accused, he instructed another police officer to take over the recording of the statement. It would appear, that in their enthusiasm, the police were not adequately prepared to record a proper caution statement of the accused person. It certainly would have been more desirable for a specified officer, other than Inspector Giam, to have been assigned the responsibility of administering a proper caution to the accused person and then to record the statement of the accused person.

The end result of all this confusion is that it appears to the Court that no proper caution was in fact administered and that the statement made by the accused was, therefore not in compliance with the requirements of the law.

Therefore considering all the facts of the present case in its totality, this Court is of the view that the statement made by the accused are inadmissible.

Prosecution's case

(a) **Discovery of facts**

The prosecution then attempted to adduce other statements made by the first accused on the ground that these statements were admissible under s. 27 of the Evidence Act as they led to the discovery of other facts.

Inspector Giam said that the first accused gave him certain information which allegedly led to the discovery of other drugs in the house. A black plastic bag containing a block of dried leaves (suspected of being ganja) was found in the bathroom hidden behind a blue container hanging on the wall of the toilet. In reply to a question by Inspector Giam whether there were anymore ganja in the house, the first accused was also said to have taken Inspector Giam to the second room of the house where he took down a box which contained 10 bundles of brown paper rolls containing ganja. In this box, a total of 5,000 rolls were found. The first accused was also alleged to have said that there was another small block of ganja on a table. The first accused was also alleged to have brought out three newspaper packages,

each containing 10 bundles of brown paper rolls. An aluminium container containing seeds suspected of being ganja; a bundle of brown paper from under a bed; a plastic container containing brown paper cut into small squares; and a weighing scale were also found.

(b) **Prosecution witnesses**

Besides, Inspector Giam, the prosecution also called Inspector Zulkifli, Inspector Mohd. Tahir and ASP Nor Azman as witnesses. All three witnesses gave evidence similar to that of Inspector Giam as to what had transpired during the raid.

The police photographer who took photographs of the exhibits as well as certain photos of the first accused taking down the box containing the 10 bundles of brown paper rolls appeared as a prosecution witness, as did Mr. Primulapathi Jaya, the Government Chemist; DPC Nurazlina Abdullah, the police officer in charge of the exhibit store, and the landlord of the house which the accused persons were occupying.

One of the prosecution's witness was Ismail Katan, the third person who was also found sleeping at the house during the police raid.

(c) **Exhibits**

The prosecution adduced sufficient evidence to establish that there was no break in the chain of evidence relating to the exhibits. The defence did not challenge the findings of the Chemist nor was there any serious challenges as to any break in the chain of evidence relating to the exhibits.

Case against first and second accused

The prosecution's case was that as the first and second accused had possession of the drugs found in the house, they are deemed to be trafficking in the said drugs. The prosecution also relied on the statements made by the first accused in response to Inspector Giam's questioning which the prosecution claimed led to the discovery of the drugs in the bathroom, the second room and in the living room. The prosecution claimed that these statements, though amounting to a confession, were admissible under s. 27 of the Evidence Act.

Close of prosecution's case

At the close of the prosecution's case, this Court, acting in accordance with s. 180 of the Criminal Procedure Code and the principles stated in *Haw Tau Tua v. PP* [1981] CLJ (Rep) 11 (PC) and *PP v. Munusamy* [1987] 1 MLJ 492 (SC), held that the prosecution had succeeded in making out a *prima facie* case against the first accused, but had failed to make out a *prima facie* case against the second accused. This Court, therefore accordingly called upon the first accused to enter his defence.

The second accused was acquitted and discharged.

B. ***Second accused***

Acquittal and discharge of the second accused

Both the accused were charged jointly for trafficking in dangerous drugs.

It should be stated at the offset that both the accused were **not** charged jointly for the offence of trafficking in dangerous drugs in furtherance of a common intention under s. 39B(1) of the DDA read together with s. 34 of the Penal Code. The joint charge, must therefore be obviously under s. 170 of the Criminal Procedure Code.

The reason as to why I draw this distinction is to highlight a common misunderstanding that a joint charge is a charge of two or more persons which always falls within the purview of s. 34 of the Penal Code. This distinction is important as it has significant effect on the findings of the Court as to the guilt or otherwise of one accused and as to how this affects the other accused.

The scope of s. 34 of the Penal Code is well understood: where two or more persons act, in furtherance of a common intention to commit an act, all such persons may be charged together for the commission of the same offence, even though only one of them actually committed the physical act which resulted in the commission of the offence.

(a) **Joint charge of two or more persons**

Section 170 of the Criminal Procedure Code provides that where several accused persons commit the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons may be charged with committing all the offences at the same trial.

It should be noted that where two or more persons are jointly charged in pursuance to s. 170 of the Criminal Procedure Code, it is **not** essential for the prosecution to establish that each of them was acting in furtherance of a common intention (that is, acting in concert with one another). The important feature of a joinder of two or more accused is that each may be acquitted or convicted of independently committing the offence which is the subject matter of the joint charge.

This important effect of a joinder of accused persons was also unclear under the English law until the decision of the House of Lords in *Director of Public Prosecution v. Merriman* [1973] AC 584, [1972] 3 All ER 42. The House of Lords in overruling certain earlier English decision held that where two or more persons had been charged jointly with an offence, it was not necessary for the prosecution, in order to secure the conviction of each accused person, to prove that each was acting in concert with the other. Each of the accused person could be convicted of independently committing the offence. Lord Morris of Borth-Y-Gest observed:

> [A joint charge] only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having himself committed an offence.
>
> (at p. 46(f)-(g).

His Lordship added:

> All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others ... The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B **unless individual guilt is established**.
>
> (Emphasis added, at p. 46(h).

Lord Morris further added:

> So unless there is some special statutory provision, there is no magic in speaking of joint charge. If the language of the law is to be used then a joint charge is also a several charge.
>
> (Above at p. 46(h)-(j).

Therefore, it is only for the purpose of avoiding duplicity of presenting the case against the second or other accused, that the prosecution prefers a joint charge against two or more persons. The facts establishing the *actus reus* in the case of both the accused is the same, though the *mens rea* may be different: see also *11 Halsbury's Laws of England*, 4th Edn., (now Vol. 11(1) of the Reissue), para. 215).

In Malaysia, though there is a dearth of cases spelling out the principles of law involved in a joint charge, the observations of the House of Lords in *DPP v. Merriman*, above, is useful. Much of what was said by the House of Lords, may be applicable to the law in Malaysia, with the necessary adaptations. In *Jayaraman & Ors. v. PP* [1979] 1 MLJ 88, Harun J spelt out the tests which must be satisfied in cases of joint charges.

One of the consequences of a joint charge is that the evidence adduced by the prosecution may not be sufficient to establish the guilt on each and everyone of the accused. In cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. In cases of joint charges, however, the prosecution must adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise.

The other danger of a joint trial is that if no evidence is adduced against the second accused, and subsequently the second accused is acquitted, it may have worked to the prejudice of the second accused as he may have been subjected to a long and complicated trial which to a large extent may not have been relevant to him. In the Singapore case of *Loh Shok Mow v. PP* [1987] 1 MLJ 362, the High Court, on the facts of that case held that the joint trial in that case had occasioned in failure of justice (at p. 382)

(b) **Case against second accused**

In the present case, both the accused have been charged jointly for trafficking in drugs. The drugs were found in a house in which the accused lived (as husband and wife) together with their three children.

Bearing in mind that this is a joint charge, the prosecution is under a duty to establish sufficient evidence against each of the accused. The prosecution must prove each and everyone of the ingredients of the offence against both the accused. But what is the evidence which has been adduced against the second accused?

It is said that by the very fact that the second accused lived with the first accused in the house as husband and wife, she is in joint occupation of the premises and therefore in joint possession with the first accused of the drugs found in the house.

There are two aspects to this argument, (i) joint occupancy of the premises; and (ii) joint possession of the drugs.

i) **Joint occupancy of the premises**

The prosecution for purpose of establishing joint occupancy has only relied on the presumption under s. 37(g) read together with s. 37(b). This presumption may be invoked to establish knowledge of the drugs on the part of the second accused in the premises (only of those which were concealed) if it can be established that she too, like the first accused had care and management of the premises. It should be emphasised at this stage that the presumption under s. 37(g) merely imputes knowledge on the part of the occupier of the premises of any drugs concealed in the premises. Even assuming that the drugs were in fact concealed (without deciding on the issue at this stage of the trial), the prosecution is merely

able to establish knowledge on the part of the second accused. Even then, it is so only if it can be established that the second accused had care and management of the premises so as to deem her to be an occupier of the premises under s. 37(b).

In the present case, no evidence at all had been adduced to establish care and management of the said premises by the second accused, except for the bit of evidence that was adduced that on a few occasions she had paid the rental of the house to the landlord. This fact alone, however, is insufficient to establish care and management. Further in the absence of any statutory provisions to the contrary, it cannot, as a general rule be said that a wife, without any other evidence is deemed to have care and management of the premises in which she is living with her husband and family. It would indeed be a startling proposition to say that every member of a family living in a house has care and management of the premises for purpose of deeming them to be occupiers so as to impute knowledge on their part of any offence as grave as that provided for under the Dangerous Drugs Act. It is because of the gravity of the offence and the severity of the punishment involved that the Courts have been cautious in holding all occupiers of a said premise to have knowledge, or for that matter custody and control over anything found within the premises (see discussion below).

Even assuming that I am wrong in holding that the second accused had no care and management of the premises and therefore she was not an occupier for the purposes of the application of the presumptions under s. 37(b) and (g) of the Dangerous Drugs Act, the prosecution would have merely established knowledge of the concealed drugs on the part of the second accused. But knowledge, in itself is insufficient to establish possession. The prosecution, must also show that the second accused besides having knowledge of the drugs, also had custody and control of the drugs. But not an iota of evidence was adduced to establish custody and control of the drugs by the second accused. As I had stated earlier throughout the trial absolutely no evidence was adduced against the second accused except for the occasional payment of the rentals.

Therefore, it is clear that on this ground the prosecution had failed to make out any case against the second accused.

(ii) **Joint possession**

Can it be said that the fact that the second accused lived in the house with the first accused, necessarily means that she is in joint possession of the drugs.

First, it must be stressed that unlike in some other countries there is no provision under Dangerous Drugs Act to provide that in such circumstances, the second accused is deemed to be in joint possession: see the provisions in Singapore under the Misuse of Drugs Act.

Secondly, for purpose of criminal liability, the mere fact that someone had knowledge of the drugs cannot be equated with possession of the drugs without establishing some form of control by the said person. It is often misunderstood that where the police raid a house occupied by two or more persons and a quantity of drugs are found, all such persons are in joint possession. The correct principle of the law is that unless all such persons had custody or control over the drugs, they are not in possession of the drugs. This is true, even if all of them had knowledge of the drugs: see *R v. Searle* [1971] Cr. LR 592, CA.

In *Tansley v. Painter* [1969] Cr. LR 193, the Divisional Court held that where drugs were found in a car in which there were two persons, the mere knowledge of one that the other was selling drugs was no evidence of joint possession. Again it was stressed that mere

knowledge of existence of the drugs could not be equated with custody and control. This principle of law is succinctly stated in Bucknell & Ghodse, *Misuse of Drugs*, (Criminal Law Library No. 2) 2nd Edn. 1991, Waterloo Publishers, at para. 11.08 as follows:

> The mere fact that a defendant knows that someone else has drugs in premises or a car that he shares is not enough to make him a participator in the offence of possessing them. Joint possession has to be proved.

In *R v. Bland* [1988] Cr. LR 41 (quoted with approval by the Supreme Court in *Choo Chang Teik & Anor v. PP* [1991] 1 CLJ (Rep) 54) the Court of Appeal held that 'the fact the appellant and Ratdiff (the co-accused) lived together in the same room was not sufficient evidence' to draw the inference that she had provided some assistance or encouragement to the co-accused who was dealing in drugs.

In the present case, therefore the second accused, even if she had knowledge of the drugs in the house (which had not been proved by any evidence but which at the most can be imputed if the presumption under s. 37(g) is applicable) cannot be said to be in joint possession. There was no evidence at all of custody or control of the drugs by her. In the absence of such evidence, she cannot be said to have committed the offence of trafficking under the Dangerous Drugs Act.

(c) **Conclusion:**

As stated earlier, at the close of the prosecution's case, I therefore acquitted and discharge the second accused.

C. ***First Accused***

Defence of first accused:

The first accused gave evidence on oath. The defence of the first accused was that none of the drugs found in the house belonged to him. The first accused stated that all of the drugs belonged to Ismail Katan. The defence also challenged, in cross-examination of the prosecution witnesses, particularly Inspector Giam, the admissibility of the statements purportedly made by the first accused which the prosecution claimed led to the discovery of the drugs.

(a) **Basic facts**

The basic facts of the case may be reduced as follows: the first and second accused lived with their children in the house. Ismail Katan who was also arrested at the time of the police raid visited the accused persons from time to time. Evidence was adduced that he would occasionally spend the night at the house and was regarded as a close member of the family. On the night prior to the raid, Ismail Katan was spending the night in the house.

That a large amount of drugs was found in the living room, bathroom and the second bedroom of the house is clear. Though this fact may appear to suggest that the first accused had knowledge of the existence of at least some of the drugs in the house, however, the more pertinent question is, whether it could be said that the first accused had possession of **all** the drugs for purposes of s. 39B, read together with s. 37(da) of the Dangerous Drugs Act. Section 37(da) provides as follows:

> Any person who is found in possession of [dangerous drugs beyond the amount stated] ... shall be presumed, until the contrary is proved, to be trafficking in the said drug.

It must be remembered that the first accused is charged with possession of **all** the drugs found in the house.

(b) **Possession**

Possession is not defined in the Dangerous Drugs Act. However, it is now firmly established that to constitute possession, it is necessary to establish that (a) the person had knowledge of the drugs, and (b) that the person had some form of control or custody of the drugs. To prove either of the these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s. 37 of the Dangerous Drugs Act.

In cases where direct evidence is adduced, the defence, to secure an acquittal needs only to cast a reasonable doubt on the prosecution's case whereas in cases where the presumption is relied upon, the defence need only rebut the presumptions on the balance of probabilities: *Mohamad Radhi v. PP* [1991] 1 CLJ (Rep) 311.

(i) **Knowledge**

The prosecution's contention is that there is sufficient direct evidence to establish knowledge of the drugs on the part of the first accused. It is further contended that even if there was not, then (a) by the statements made by the accused to the police which led to the discovery of the drugs, knowledge may be inferred; and/or (b) by the application of the presumptions under s. 37, knowledge of the drugs may be imputed on the accused. For this purpose the prosecution relies on the presumptions stated in s. 37(b), (d) and (g) of the Dangerous Drugs Act.

Two points must, however be stressed at this stage: (i) that knowledge is only one of the ingredients of the offence of possession. Mere knowledge by itself does not amount to possession. Therefore, even if the prosecution succeeds in establishing knowledge, it must also go a step further and establish control or custody of the drugs by the first accused; and (ii) the prosecution must establish that the accused had knowledge of **all** the drugs, the possession of which he is being charged for. Knowledge merely of some of the drugs is insufficient as he is not being charged separately for the drugs found in the different parts of the house.

Section 27 of the Evidence Act

For purposes of establishing knowledge by the first accused of the drugs in the house, the prosecution has attempted to adduce the statements made by the first accused as to the whereabouts of the drugs in the house by virtue of s. 27 of the Evidence Act.

Without delving into the complexities of s. [27], it needs only to be stressed that one of the main requirements for the admissibility of a statement made by an accused person under s. 27 is that the information given by way of the statement must be such as to lead to the discovery of a fact. The term 'discovery' has been narrowly interpreted to mean no prior knowledge of the fact by the police, or the obtaining of a fact which was otherwise not available to the police prior to the making of the statement by the accused. As it is said:

> In order that a discovery may come under the provisions of this s. 27, the place from which the incriminating article was recovered must be a place of concealment which would be difficult or impossible for the police to discover without some assistance from the accused.
>
> [Ratanlal & Dhirajlal, *The Law of Evidence*, 17th Edn., p. 82].

In other words, s. 27 is not applicable in cases of a mere recovery of a fact or of a reconfirmation of an already known fact. As is often said, 'an ordinary **recovery** cannot be turned into a **discover**.' In an Indian Supreme Court case referred to in Ratanlal above, it was said:

> The discovery must be of some fact which the police had not previously learnt from other sources.

Section 27 is also not applicable where the police already had the means of obtaining the fact. Section 27 is not a *carte blanche* provision to allow the admissibility of all statements made by an accused person. It has to be strictly construed. In the leading Privy Council decision of *R v. Ramasamy* [1965] AC 1, Viscount Radcliffe in discussing the scope of s. 27 of the Evidence Ordinance of Ceylon, which is in *pari materia* to s. 27 of the Malaysian Evidence Act observed:

> Section 27 ... envisages a situation in which circumstances themselves vouch for the truth of certain statements made by the accused person ... These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been **the cause** of the discovery.
>
> [Emphasis added, at p. 14]

The Supreme Court of Malaysia in *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171, at p. 175 said:

> It must be borne in mind that for ss. 27 of the Evidence Act to apply, the information must be such as caused the discovery of a fact. In other words, the fact must be the **consequence** and the information the cause of its discovery.
>
> [Emphasis added]

The dangers of s. 27 have been emphasised by the Courts in several cases. In *Pang Chee Meng v. PP* [1992] 1 CLJ (Rep) 265, Abdul Hamid LP in the Supreme Court observed:

> Section 27 has frequently been misused by the police and the Courts should be vigilant about the circumvention of the provision.

His Lordship added:

> The protection afforded by the wholesome provisions of ss. 25 and 26 may sometimes be whittled down by the police in their ingenuity to get the information given by the accused recorded in the case diary in a way it would appear that it led to the discovery of some facts **although the police might have had such discovery from other sources** ... the Courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.
>
> [Emphasis added, at p. 269]

In *R v. Ramasamy* above, Viscount Radcliffe said:

> It has always been regarded as the common practice that Judges should be strict in applying the requirement that the words admitted must "relate distinctly" to the fact. No doubt it is considered that such a practice is likely on the whole to tell in favour of an accused, even though it may result in the exclusion of self-exculpatory statements.

In the present case, the police had already received information from other sources even prior to the raid as to the existence of drugs in the house. Furthermore, the very purpose of the raid was to recover all incriminating evidence. A superficial search by the police, especially bearing in mind the number of police personnel present during the raid, and the small area of the house in which the search need to be confined to, clearly indicates that the existence of the drugs in the house could have been found by the police themselves based on the prior information which they already had without much difficulty and without the assistance

of the accused person. It was certainly not discovered by the police solely as a consequence of the confession made by the first accused. The fact that the police knew of the existence of the drugs in the house even before any statements were made by the first accused is an important factor in considering the admissibility of the statement made by the first accused.

On the authorities referred to above, particularly the caution stated by the Supreme Court of the need for the Courts to be vigilant against the admission of an otherwise inadmissible statement, I hold that the statements made by the first accused which purportedly led to the discovery of the drugs are inadmissible as they do not fall within the ambit of s. 27.

Presumptions

The prosecution has, also attempted to establish knowledge on the part of the first accused by invoking the presumptions under s. 37 of the Dangerous Drugs Act. The prosecution has contended that as the first accused was the occupier of the premises, by virtue of the presumption under s. 37(g), the first accused is presumed to have knowledge of the drugs.

For the presumption under s. 37(g) to apply, it must first be shown that the drugs were (a) concealed in the premises; and (b) that the first accused was the occupier of the premises.

That the first accused was an occupier of the premises is clear by the fact that he had care and management of the premises and by virtue of s. 37(b), he is also deemed to be an occupier.

But were the drugs found concealed in the premises? It is said by the prosecution that the drugs found in the box in the second room and that found in the bathroom hidden behind a container were concealed. The defence, however argue that even if this were true, the drugs found in the kitchen/dining area were not concealed, and as the prosecution had failed to establish the precise weight of the drugs which were concealed in the box and in the bathroom and that which was not concealed, it cannot be said that the first accused was deemed to have knowledge of **all** the drugs by the application of the presumption under s. 37(g) for the purposes of the charge of trafficking.

There appears to be some merit in this argument of the defence. It is imperative for the prosecution to establish that the accused had knowledge (presumed or otherwise) of **all** the drugs for which he is being charged. Mere knowledge of part of the drugs and not the whole of it which forms the subject matter of the charge is insufficient, unless of course, the charge was restricted to those drugs which were concealed and if its weight was above the prescribed amount.

However, it may be said that knowledge of all the drugs may be established partly by direct evidence and partly by the application of the presumptions. For this purpose, the prosecution contends that the first accused had actual knowledge of the drugs found in the kitchen/ dining area of the house. Therefore, it is said that knowledge of **all** the drugs by the first accused is established: actual knowledge of the drugs in the kitchen/dining area and presumed knowledge of the drugs concealed.

I may also point out that in this case, the prosecution has also attempted to rely on the presumption under s. 37(d). For this purpose, the prosecution must first establish that the first accused had custody or control over ‘anything’ which contained the drugs. However, the same problem again arises: not all the drugs were contained in something - certainly not the rolls found in the kitchen/dining area. To overcome this problem, the prosecution then puts forward the same argument: as the drugs found in the bathroom and the second room were in a plastic bag or in a box, it was therefore contained in something, and as such the first accused had possession of them, whereas in the case of the drugs found in the kitchen/

dining area, the first accused had actual knowledge of them.

Even conceding, but without deciding on the argument of the prosecution that the prosecution may rely partly on direct evidence and partly on the presumptions in a particular case to establish knowledge is tenable, there is however another problem which the prosecution has to overcome, that is, if knowledge is established (either by direct evidence or by the application of the presumption under s. 37(g)), the prosecution to establish possession must also establish custody and control of the drugs by the first accused. Furthermore, custody and control must also be established for purposes of the application of the presumption under s. 37(d).

Therefore, it is imperative for the prosecution to establish custody and control of the drugs by the first accused for two purposes: (i) if knowledge of the drugs is established by either direct evidence or by the application of the presumption under s. 37(g), the prosecution to establish **possession**, must also establish custody or control of the drugs by the first accused; and (ii) to rely on the presumption under s. 37(d), custody and control must first be established.

(ii) **Custody and Control**

As the issue of custody and control is crucial for the prosecution's case, the issue will now be considered.

It must be borne in mind that s. 37(g) does not, unlike s. 37(d) deem the occupier of the premises to be in possession. Whilst s. 37(d) provides that if any person is shown to have custody or control over anything containing drugs, the presumption of both knowledge **and** possession will arise, s. 37(g) merely provides that any person who is occupier (by virtue of having care and management of the premises) is deemed to have only knowledge (and I emphasise, not possession) of the drugs so concealed. The prosecution, when relying on s. 37(g) has still to show some form of custody or control over the drugs by the accused person.

Occupancy of a premise where drugs are found does not necessarily always mean that the occupier has custody and control of the drugs. Recent case-law has now firmly established that for a person to be incriminated for the drugs found in a premise occupied by him, it must clearly be established that such person had exclusive control over the premises. Therefore, where a premise is occupied by several persons, all such occupiers, or anyone of them, cannot be implicated unless it is shown conclusively that they or that particular person had exclusive control of the premises.

In the present case, the presence of the drugs all over the house may seem to indicate strongly that the first accused had control over them. As an occupier, he must, *prima facie* be said to have control over them. This is a strong inference, especially in the light of the holding of this Court earlier that the second accused (his wife) was not in possession of the drugs. In a normal case, such evidence would be sufficient to secure a conviction for the offence of possession and hence trafficking.

However, one crucial factor that has caused some concern to me in finding conclusively the guilt of the first accused is the presence of the third party in the house, Ismail Katan.

As stated earlier, at the time of the arrest of the first accused, besides his wife (the second accused), the police also found Ismail Katan sleeping in the second bedroom. Ismail Katan was also arrested at the same time as the first and second accused. In evidence, it was clearly

stated that Ismail Katan, a relative of the first accused occasionally visited the first accused and would also spend the night in the first accused's house. He sometimes slept in the living room and on the night of the raid he was sleeping in the second bedroom. However, it should be pointed out that no personal items belonging to Ismail Katan was found by the police either in the second room or in any part of the house. The strange findings of the police was, however, that a large amount of drugs were found in the room occupied by Ismail Katan that night but no drugs were found in the room occupied by the first (and the second) accused. But too much importance cannot be placed on this fact alone.

The important fact is that on the night of the raid when the drugs were found in the house, the first accused was not alone in the house. There was also Ismail Katan.

Ismail Katan, of course in his evidence as prosecution witness, made a denial that the drugs belonged to him. However, he did not say that the drugs belonged to the first accused either. In fact, at one stage of the cross-examination, he appears to agree with the Counsel for the first accused that the drugs did not belong to the first accused. When re-examined by the prosecution on this point, he appeared confused.

I must point out that too much weight cannot be placed on the evidence of Ismail Katan. Watching his demeanour in Court, he was nervous, cautious and non-committal to many of the questions which were asked of him. He was, however clearer when he narrated the events subsequent to his arrest. Bearing in mind, that he was also arrested and subsequently released on bail, one can understand his predicament in appearing in Court in giving evidence.

But be that as it may, can it be said that all the drugs that were found in the house belonged to the first accused? Was every bit of the drugs that was found in the various parts of the house belong to the first accused? It should be remembered that the first accused is charged for being in possession of **all** the drugs that were found in the house on the night of the raid. It is therefore essential that there must be sufficient proof to establish that all the drugs - and not merely **some** of them, belonged to the first accused.

The presence of a third party in the house, Ismail Katan, raises some doubt as to whether it could be said conclusively that all the drugs found in the house were in the possession of the first accused.

Where two or more persons are found in a place where an alleged offence is said to have been committed, and if the evidence as to the commission of the offence does not clearly point to one or to the other, it is said that the guilt of either has been established. In the case of *R v. Abbot* [1955] 2 A11 ER 899, Lord Goddard CJ in the Court of Criminal Appeal said:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concent, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case.
>
> [At p. 901]

This observation of Lord Goddard CJ has been approved and applied by our Supreme Court in *Choo Chang Teik & Anor. v. PP* [1991] 1 CLJ (Rep) 54.

Another observation of Lord Goddard CJ in the same case was also applied by the Supreme Court in *Shamsuddin bin Hassan v. PP* [1992] 1 SCR 494. In that passage, Lord Goddard CJ said:

> [Where] two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.
>
> [At p. 901]

Though the above observations of Lord Goddard CJ and the application of them by the Supreme Court has been in cases where both the persons had been charged and tried, the same principles are equally applicable in a case, like the present, where only the first accused is being charged without the other party: see the decision of Shanker J in *PP v. Aris* [1989] 2 CLJ (Rep) 289 (HC). The principles applicable in both the situations are the same: if it is not clearly established whether A or B committed the offence, irrespective of the fact that only A is being charged, then A cannot be found guilty if the evidence does not conclusively indicate his guilt. In fact, this principle applies with greater force in cases dealing with possession. If it cannot be established whether A or B had possession of the offending item, neither A nor B can be found guilty, unless of course, A and B had been jointly charged with a common intention, and if common intention can be established.

In *Shamsuddin v. PP*, above, where a husband and wife were jointly charged for possession (and trafficking) of drugs found in a parcel thrown out of a car occupied by the accused, Harun Hashim SCJ in acquitting both of them observed:

> At best the evidence showed that one of the appellants must have had custody and control of the drugs to throw it out of the car. But who?
>
> [At p. 497]

His Lordship held that in the absence of evidence as to who exactly threw the parcel out of the car, neither of the accused could be found guilty. He further added:

> It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.
>
> [At p. 498]

The presence of Ismail Katan in the house raises another problem. Generally if no exclusive use or occupation of a room or house can be established, especially in the light of available evidence that other persons too had access or occupation of the premises, then it cannot be said that the occupier of the premises had custody and control over everything found in the premises. In this regard, an analogy may be drawn with cases establishing custody and control of the drugs for the purposes of rebutting the presumptions under s. 37(d) of the Dangerous Drugs Act.

The Supreme Court in *Lee Chee Meng v. PP* [1992] 1 SCR 483, held that the fact that at the time of the arrest of the accused in the room, there was another person, indicated that the accused did not have 'exclusive use' of the room. Hashim Yeop Sani CJ further pointed out that this fact alone was sufficient to acquit the accused.

In *Pang Chee Meng v. PP* [1992] 1 CLJ (Rep) 265, the Supreme Court held that the trial Judge was wrong in holding that the accused had exclusive possession when there were others sharing the house. Abdul Hamid LP pointed out that:

> In the light of the material contradictions and the circumstances surrounding, we are not satisfied that the prosecution had proved **exclusive** custody and control of the drugs found in the room.
>
> [Emphasis added, at pp. 271]

In *Choo Chang Teik & Anor. v. PP* [1991] 1 CLJ (Rep) 54, the Supreme Court held that on the proper assessment of the evidence, it was probable that both the accused had no knowledge of the drugs in the travelling bag recovered from the toilet of the master bathroom.

Conclusion

Where a person is charged with a commission of an offence, the prosecution to obtain the accused's conviction for the specific offence charged, must prove to the satisfaction (beyond reasonable doubt) of the Court that each and every factual ingredient of that offence existed in the case of the accused. This burden of proof, as stated by Lord Sankey in *Woolmington v. DPP* [1935] AC 462, has always been followed by the Malaysian Courts: see the recent Supreme Court decision in *Pang Chee Meng v. PP* [1992] 1 CLJ (Rep) 265.

Lord Diplock in *R v. Courtie* [1984] 1 All ER 740 explained the dictum of Lord Sankey in *Woolmington's* case as follows:

> An accused person cannot be convicted of any offence with which he is charged unless it has been established by the prosecution that each one of the factual ingredients which are included in the legal definition of that specific offence was present in the case that has been brought against him by the prosecution.
>
> [At p. 741]

Of course, some of the ingredients of the offence may be established by the application of relevant presumptions under any statute.

It is now established law in Malaysia that exclusive custody and control is an essential ingredient of the offence of possession of drugs. Therefore, in the present case, especially in the light of the presence of another person in the house, namely Ismail Katan, there is some doubt cast as to whether the first accused had exclusive possession of the drugs found in the house.

I, therefore hold in conclusion that the prosecution has failed to prove beyond reasonable doubt that the first accused had possession of all the drugs found in the house which is the subject matter of the charge. Under these circumstances, the offence of trafficking has not been proved either.

I may also add that even if the presumptions under s. 37(d) of the Dangerous Drugs Act are said to be applicable, I am satisfied that on the facts, the first accused has, on a balance of probabilities rebutted these presumptions, thus casting a reasonable doubt in the prosecution's case: *Mohamad Radhi v. PP* [1991] 1 CLJ (Rep) 311, followed.

It is unfortunate that the real culprit who had these large quantities of drugs in the house has not been brought to justice. The Deputy Public Prosecutor, has, under the circumstances, done her best to prove her case against the first accused. However, she has failed to secure the conviction of the first accused not because of her lack of diligence but because of the strict proof required under our criminal law. Being unable to rely on the caution statement nor of any evidence under s. 27 of the Evidence Act has made the task of the prosecution even more difficult.

Furthermore, the prosecution in the present case was only able to invoke certain available presumptions. There is however, no presumption which may be relied upon under the Dangerous Drugs Act to impute, not only knowledge on the part of the occupier of the premises but also custody and control of the things found in the premises. Even the presumptions under s. 37(g) is limited in its application to only drugs which are concealed. Even then, it does not, like the presumptions under s. 37(d) impute anything further.

A further problem which has compounded the present case is the fact that the first accused was charged with possession of **all** the drugs found in the various parts of the house. This created some difficulty to the prosecution. It had the difficult task of establishing knowledge and custody of **all** of the drugs by the first accused of the drugs found in the house. Had the first accused being charged separately for the drugs found in the different parts of the house, the prosecution's task might have been lighter. But as it is, the learned Deputy Public Prosecutor had difficulty in establishing possession of all the drugs.

However, the Court's duty is to reach a verdict on the available evidence. In this regard, I would like to quote the following passage from the decision of the Supreme Court in *Krishnan v. PP* [1987] CLJ (Rep) 145 at p. 150:

> It is one of the most basic rules of justice that, however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But ... his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

Therefore, on the totality of the evidence before me, I acquit and discharge the first accused.

(Oleh demikian, saya membebaskan dan melepaskan tertuduh pertama).

Also found at [1992] 4 CLJ 2028